Mary Colete John v South East Asia Insurance Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-3 OF 2008 (J)
ALAUDDIN PCA, MOHD GHAZALI AND HELILIAH FCJJ
24 AUGUST 2010

Insurance — Motor insurance — Liability — Insurer's liability — Liability of insurers to satisfy judgment obtained by passenger against insured — Whether liability had to be liability covered by policy — Exclusion of liability — Exceptions to — Road Transport Act 1987 s 91(1)(bb)

Road Traffic — Motor insurance — Liability of insurers to satisfy judgment obtained by passenger against insured — Whether liability had to be liability covered by policy — Whether policy covered — Exclusion of liability — Exceptions to — Road Transport Act 1987 s 91(1)(bb)

Words and Phrases — 'contract of employment' — Road Transport Act 1987 s 91(1)(bb)

Two questions were framed for the Federal Court's determination in the instant appeal. First, whether the words 'contract of employment' in s 75(1)(b)(ii) of the Road Traffic Ordinance 1958 ('RTO') (superseded by s 91(1)(bb) of the Road Transport Act 1987 ('RTA')) had been enacted by Parliament to cover only passengers who were being carried pursuant to a contract of service, or whether the words covered passengers who were carried pursuant to a variety of employment and business reasons, such as in the case of the appellant in the instant appeal. Second, whether it was necessary to read into s 91(1)(bb) of the RTA, s 75(1)(b)(ii) of the RTO and the insurance policy after the words 'contract of employment' the words 'under a contract of service' and thereby restrict the meaning of the words 'contract of employment'.

Held, dismissing the appeal with costs:

(1) There is an exception to the exclusion of liability in proviso (bb) to s 91(1) of the RTA. The exception, inter alia, is that the insurer shall be liable in respect of the death or bodily injury to persons being carried in the motor vehicle at the time of the occurrence of the event out of which the claims arise, in the following instances: (a) in the case of a motor vehicle in which passengers are carried for hire or reward; or (b) by reason of or in pursuance of a contract of employment (see para 12).

(2) In the instant appeal, the meaning of the phrase 'contract of employment' was very important. It was only after a 'contract of employment' had been established that the question ensued whether the appellant was being carried by reason of or in pursuance of a contract of employment. The phrase 'contract of employment' is used interchangeably with the phrase 'contract of service' as noted in the Employment Act 1955 and the Industrial Relations Act 1967. Despite the difference in the way the legislation has defined the phrases 'contract of employment' or 'contract of service', the essential characteristic of the definitions is that the contract must be between an employer and an employee with regard to the provision of service by the employee (see paras 28 & 31).

(3) It is untenable to suggest that the words 'contract of employment' in s 91(1)(bb) of the RTA should import a different definition than the definitions already stipulated in the Employment Act 1955, Workmen's Compensation Act 1952, Industrial Relations Act 1967, Employees' Social Security Act 1969, Employees Provident Fund Act 1991 and the Occupational Safety and Health Act 1994, as these legislation are intended to regulate the relationship between a workman (or employee) with an employer (see paras 29(a)–(f) & 37).

(4) The first question posed was an attempt to sidetrack the facts in the instant appeal. A 'contract of employment' was equipollent to a 'contract of service'. The legislation had to be construed according to its terms and it was not permissible to deviate from its very terms. There was no question of having to consider the word 'employment' or what activity could be described as being a certain variety of employment in the instant case. The variety of employment, if any, was simply one facet of a contract of employment. The legislation had been crafted in specific terms. Hence the second part of the first question was totally unnecessary to answer (see para 41).

(5) The second question was also calculated to mislead as it was tantamount to requesting the court to rewrite the legislation. The terms 'contract of employment' or 'contract of service' were interchangeable. Both meant the same thing. The question sought to assert an ambiguity when there was none. Both questions invited the court to import words that were not there and to freely interpret the law to accord a favorable view to the appellant (see paras 42–43).

(6) The dissenting judgment in the Court of Appeal below had wrongly invoked and relied upon s 96(1) of the RTA to find that the respondents in the appeal were liable. The liability had to be a liability covered by the terms of the policy (see paras 44–45).

[Bahasa Malaysia summary

Dua soalan dirangka untuk penentuan Mahkamah Persekutuan dalam rayuan ini. Pertama, sama ada perkataan 'contract of employment' dalam s 75(1)(b)(ii)

Ordinan Lalulintas Jalan 1958 ('OLJ') (digantikan oleh s 91(1)(bb) Akta Pengangkutan Jalan 1987 ('APJ')) yang digubal oleh Parlimen untuk melindungi hanya penumpang-penumpang yang dibawa berikutan kontrak perkhidmatan atau sama ada perkatan-perkataan tersebut melindungi penumpang-penumpang yang dibawa berikutan pelbagai sebab-sebab pekerjaan atau perniagaan, seperti dalam kes perayu dalam rayuan ini. Keduanya, sama ada perlu untuk membaca s 91(1)(bb) APJ, s 75(1)(b)(ii) OLJ dan polisi insurans selepas perkataan-perkataan 'contract of employment' perkataan-perkataan 'under a contract of service' dan oleh itu menghadkan maksud perkataan-perkataan 'contract of employment'.

Diputuskan, menolak rayuan dengan kos:

(1) Terdapat pengecualian terhadap pengecualian liabiliti dalam proviso (bb) s 91(1) APJ. Pengecualian, antara lain, bahawa syarikat insurans mestilah bertanggungan berkaitan kematian atau kecederaan badan orang yang dibawa dalam kenderaan bermotor pada masa berlakunya kejadian yang mana tuntutan tersebut berbangkit, dalam keadaan-keadaan berikut: (a) dalam keadaan kenderaan bermotor yang mana penumpang-penumpang dibawa untuk sewaan atau ganjaran; atau (b) disebabkan atau berikutan dengan kontrak pekerjaan (lihat perenggan 12).

(2) Dalam rayuan ini, maksud frasa 'kontrak pekerjaan' sangat penting. Hanya setelah 'kontrak pekerjaan' ditentukan barulah persoalan sama ada perayu dibawa dengan sebab atau berikutan kontrak pekerjaan menyusul. Frasa 'kontrak pekerjaan' digunakan berselang-seli dengan frasa 'kontrak perkhidmatan' seperti yang terdapat dalam Akta Pekerjaan 1955 dan Akta Perhubungan Perusahaan 1967. Meski perbezaan dalam cara perundangan tersebut mentafsirkan frasa 'kontrak pekerjaan' atau 'kontrak perkhidmatan', sifat penting tafsiran tersebut ialah bahawa kontrak tersebut mestilah antara majikan dan pekerja berkaitan dengan peruntukan perkhidmatan pekerja tersebut (lihat perenggan 28 & 31).

(3) Tidak dapat dipertahankan lagi untuk mencadangkan bahawa perkataan 'kontrak pekerjaan' dalam s 91(1)(bb) APJ harus mengambil tafsiran berbeza daripada tafsiran-tafsiran yang sudah diberikan dalam Akta Pekerjaan 1955, Akta Pampasan Pekerja 1952, Akta Perhubungan Perusahaan 1967, Akta Keselamatan Sosial Pekerja 1969, Akta Kumpulan Wang Simpanan Pekerja 1991 dan Akta Keselamatan dan Kesihatan Pekerjaan 1994, kerana perundangan tersebut bertujuan untuk mengatur hubungan antara pekerja dengan majikan (lihat perenggan 29(a)–(f) & 37).

(4) Persoalan pertama yang diutarakan merupakan percubaan untuk mengelak daripada fakta-fakta dalam rayuan ini. Suatu 'kontrak

pekerjaan' merupakan persamaan kepada 'kontrak perkhidmatan'. Perundangan tersebut harus ditafsirkan menurut terma-termanya dan tidak boleh menyimpang daripada terma-termanya. Tidak perlu untuk mempertimbangkan perkataan 'pekerjaan' atau aktiviti apa yang boleh dijelaskan sebagai pelbagai aktiviti tertentu pekerjaan dalam kes ini. Pelbagai pekerjaan, jika ada, hanyalah satu aspek kontrak pekerjaan. Perundangan telah digubal dalam terma-terma khusus. Maka, bahagian kedua soalan pertama tidak perlu langsung dijawab (lihat perenggan 41).

(5) Soalan kedua juga kelihatan untuk menyimpang kerana ia bermaksud memohon kepada mahkamah untuk menggubal semula perundangan. Terma-terma 'kontrak pekerjaan' atau 'kontrak perkhidmatan' boleh bertukar ganti. Kedua-duanya adalah sama. Soalan tersebut cuba untuk memperlihatkan kekaburan apabila sebenarnya tiada perkara sebegitu. Kedua-dua soalan tersebut memohon mahkamah mengambil perkataan-perkataan yang tiada di dalamnya dan mentafsirkan undang-undang dengan bebas untuk memberikan pandangan yang memihak kepada perayu (lihat perenggan 42–43).

(6) Penghakiman menentang dalam Mahkamah Rayuan telah salah menggunapakai dan bergantung kepada s 96(1) APJ dengan mendapati responden-responden dalam rayuan tersebut bertanggungan. Liabiliti tersebut haruslah merupakan liabiliti yang dilindungi oleh terma-terma polisi (lihat perenggan 44–45).]

Notes

For cases on liability, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 319–322.

For cases on road traffic generally, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1–637.

Cases referred to

Assunta Hospital v Dr A Dutt [1981] 1 MLJ 115, FC (refd)

Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304, FC (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369, FC (refd)

Izzard v Universal Insurance Company, Limited [1937] AC 773, HL (refd)

L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235, HL (refd)

Mary Colete John v South East Asia Insurance Bhd [2010] 2 MLJ 222; [2010] 2 AMR 385, CA (refd)

Memco Engineering Ltd, In re [1986] Ch 86, Ch D (refd)

O'Kelly and others v Trusthouse Forte plc [1984] QB 90, CA (refd)

Starfire Diamond Rings Ltd v Angel [1962] 2 Lloyd's Rep 217, CA (refd)

Stevenson, Jordan & Harrison, Ltd v Macdonald & Evans [1952] 1 TLR 101

Tan Keng Hong & Anor v Fatimah binti Abdullah & Ors [1974] 1 MLJ 156, FC (refd)
Ulster-Swift Ltd and another v Taunton Meat Haulage Ltd; Franson Transport NV (third party) [1977] 1 WLR 625, CA (refd)
Union Insurance (M) Sdn Bhd v Chan You Young [1999] 1 MLJ 593, CA (refd)
Vandyke v Fender and another Sun Insurance Office Ltd (third party) [1970] 2 QB 292, CA (refd)

Legislation referred to

Employees Provident Fund Act 1991 s 2
Employees' Social Security Act 1969 s 2(5), First Schedule, item 2
Employment Act 1955 s 2
Industrial Relations Act 1967 ss 2, 20(1)
Occupational Safety and Health Act 1994 s 3
Road Traffic Act 1960 [UK] s 203
Road Traffic Ordinance 1958 s 75, 75(1), 75(1)(b)(ii)
Road Transport Act 1987 ss 91(1), 91(1) proviso (bb), 96, 96(1), (2)
Workmen's Compensation Act 1952 s 2(1)

Appeal from: Civil Appeal No J-02–1073 of 2004 (Court of Appeal, Putrajaya)

N Jegatheeson (Ng Lee Kiau with him) (E Ramasamy & Co) for the appellant.
Prakash Menon (Nadaraja Vellayan with him) (Isharidah, Ho, Chong & Menon) for the respondent.

Heliliah FCJ (delivering judgment of the court):

[1] In this appeal two questions have been posed upon leave being obtained by this court. The questions are:

(a) whether the words 'contract of employment' in s 75(1)(b)(ii) of the Road Traffic Ordinance 1958 has been enacted by Parliament to cover only passengers who are being carried pursuant to *a contract of service* or do the words cover passengers who are carried pursuant to a variety of employment and business reasons such as the appellant was in when the accident occurred; and

(b) whether it is necessary to read into s 91(1)(bb) of the Road Transport Act 1987 and s 75(1)(b)(ii) of the Road Traffic Ordinance 1958 and the insurance policy after the word 'contract of employment' *the words* 'under a contract of service' and thereby restrict the meaning of word 'contract of employment'.

[2] The background leading to the appeal before us has been amply laid out in the majority judgment of the Court of Appeal (see *Mary Colete John v South*

East Asia Insurance Bhd [2010] 2 MLJ 222; [2010] 2 AMR 385). However for purposes of dealing with the two questions posed some details need to be elucidated.

[3] The appellant was a beautician and sometime in July 1985, she was engaged by one Angel Helen Puspam Pereira ('Angel') to dress, make up and beautify a bride for a wedding that is to take place in Kluang. It was agreed that the appellant would be paid RM100 by Angel and transport would be provided by Angel to enable her to travel to and fro from her home in Seremban to Kluang and back.

[4] On the appointed day the plaintiff travelled in car No BBU 8691 belonging to Angel but driven by her brother Edwin Nobel Pereira. On the way to Kluang the car skidded and overturned as a result of which the appellant suffered serious injuries.

[5] The respondent was served with the requisite notice under s 96(2) of the Road Transport Act 1987 ('RTA 1987') being the insurer of the car No BBU 8691. An action was lodged against Angel and her brother being the driver (Muar High Court Civil Suit No 23(25)–15 of 1990). Angel and her brother were held liable resulting in general and special damages being awarded. The finding on liability was affirmed by the Court of Appeal. However, the respondent in this appeal refused to pay the damages and costs awarded in Civil Suit No 23(25)–15 of 1990 resulting in the appellant commencing her action against the respondent under s 96 of the RTA 1987. The High Court dismissed the appellant's claim and on appeal the Court of Appeal by a majority decision dated 7 November 2007 also dismissed the appellant's claim.

[6] The respondent refuted liability to satisfy the judgment procured by the appellant pursuant to s 96 of the Road Transport Act 1987. As explained in the majority judgment this Act repealed and replaced the Road Traffic Ordinance 1958 ('the Ordinance'). At the time of the incident the legislation in force was still the Ordinance but the time the High Court ordered the appellant the claimed general and special damages the Ordinance had been replaced by the RTA 1987. For the purpose of this appeal what is under consideration is s 75 of the Ordinance. Since the policy of insurance which is the subject of dispute was issued pursuant to and in compliance with s 75 of the Ordinance, essentially the complaint in this appeal pertains to the interpretation to be given to the relevant clause in the policy and the provision of law applicable.

[7] The relevant clause in the insurance policy reads:

SECTION II — LIABILITY TO THIRD PARTIES

1. The company will subject to the Limits of Liability indemnify the Insured

in the event of accident caused by or arising out of the use of the Motor Vehicle against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of

(a) death of or bodily injury to any person except where such death or injury arises out of and in the course of the employment of such person by the Insured and excluding liability to any person being a member of the Insured's household who is a passenger in the Motor Vehicle *unless such person is being carried by reason of or in pursuance of a contract of employment*.

(b) damage to property other than property belonging to the Insured or held in trust by or in the custody or control of the Insured or any member of the Insured's household.

[8] The motor vehicle policy covers the insured against a variety of risks. The intention is to be gathered from the wording chosen to express the agreement in the policy itself: *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235.

[9] With regard to the term of the policy the relevant part of section II is para 1(a). The respondent company is liable to pay in respect of (i) death *or bodily injury* to any person except (ii) where such death or injury arises out of the employment of such person by the insured and (iii) excluding liability to any person being a member of the insured's household who is a passenger in the motor vehicle unless (iv) such person is being carried by reason of or in pursuance of a contract of employment.

[10] The two questions posed to this court relate to the provision of law pursuant to which the personal liability of the insured is covered by the insurers. The appellant relies upon s 75(1) of the Road Traffic Ordinance 1958 ('RTO') (applicable at the time where the policy was issued) and now superseded by s 91(1)(bb) of the current Road Transport Act 1987 ('RTA'). Both provisions however are identical and for the purposes of the appeal, reference is made only to the relevant parts of s 91(1) that states:

91

(1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which —

(a) is issued by a person who is an authorized insurer within the meaning of this Part; and

(b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:

Provided that such policy shall not be required to cover —

(aa) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(bb) *except* in *the case of a motor vehicle in which passengers are carried* for hire or reward or *by reason of or in pursuance of a contract of employment*, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or ...

[11] The court is concerned with the proviso to the section '... a proviso is usually construed as operating to qualify that which precedes it': *In re Memco Engineering Ltd* [1986] Ch 86 at p 98.

[12] In the instant appeal the proviso to s 91(1)(bb) of the RTA that excludes the liability of insurer could be described as 'double edged'. The effect of the proviso is to exclude liability 'in respect of the ... of *bodily injury sustained* by death arising out of *and* in the course of his employment of *a person in the employment of a person insured by the policy* or of *bodily injury sustained by such a person arising out of and in the course of his employment*'. An exception is however made to the proviso. The exception, inter alia, is that the insurer shall be liable in respect of the death or bodily injury to persons being carried in the motor vehicle at the time of the occurrence of the event out of which the claims arise, in the following instances:

(a) in the case of a motor vehicle in which passengers are carried for hire or reward; or

(b) by reason of or in pursuance of a contract of employment.

[13] As already observed by the Court of Appeal, the appellant was travelling as a mere passenger and as admitted by her she was self employed and the insured (Angel) was not her employer. However, it is the case here that the term in the insurance policy has employed the same language as found in s 91(1) of the RTA namely liability is incurred if the person is being carried 'by reason of or in pursuance of a contract of employment'.

[14] The key words in dispute here are the words 'contract of employment'. However one is not to lose sight that this is not simply a case whether a particular person is the employee of the insured for the purposes of an employer's liability policy, but rather what is the risk that is to be covered for passengers carried in a vehicle as opposed to any other injured third parties. This is a question of the liability of the insurers.

[15] The meaning and scope of the words 'contract of employment' have been deliberated upon in this appeal by the Court of Appeal and the High Court. Nevertheless learned counsel for the appellant has entreated upon this court that a broader expansive approach should be adopted in interpreting the provision of the law where the words used in the legislation are also in alignment with the words found in the policy as indicated above.

[16] The approach relied upon is embodied in the judgment of *Izzard v Universal Insurance Company, Limited* [1937] AC 773. Further reliance has also been emplaced on the judicial pronouncements in *Vandyke v Fender and another Sun Insurance Office Ltd (third party)* [1970] 2 QB 292 (CA). The two aforementioned cases need specific mention as they have been given due consideration in *Union Insurance (M) Sdn Bhd v Chan You Young* [1999] 1 MLJ 593 and relate to the construction of the words carried 'by reason of or in pursuance of a contract of employment'. The proper construction to be placed on words is a matter of law for the court. As observed by Lord Denning MR in *Starfire Diamond Rings Ltd v Angel* [1962] 2 Lloyd's Rep 217 (CA): 'It is a mistake for a lawyer to attempt a definition of ordinary words and to substitute other words for them. The best way is to take the words in their ordinary sense and apply them to the facts.' In this appeal the term 'contract of employment' has provided the source of the respondent's refusal to accede to liability. While there is no definition in the Road Transport legislation for words nevertheless the term adopted is still 'contract of employment' and no other.

[17] Before considering the meaning of 'contract of employment' it should be preceded by a consideration of the words 'by reason of or in pursuance of a contract of employment'. It is found that in the earlier decision of *Tan Keng Hong & Anor v Fatimah binti Abdullah & Ors* [1974] 1 MLJ 156 Suffian CJ (as he then was) considered a clause identical in terms with the clause in this appeal in which there was also incorporated the terms of liability of the insurers in respect of a 'passenger carried by reason of or in pursuance of a contract of employment'. For a proper appreciation of the judicial statements of Suffian CJ an outline of the facts require mention:

> On 1 June 1963, Ibrahim bin Kimpal was riding on a lorry, being driven by Tan Keng Hong, the first defendant employed by Yoong Leok Kee Corporation Ltd ('the second defendant') along the Kuala Pilah-Seremban road. Going down a slope at the bottom of which was a bend, the lorry loaded with timber overturned because of brake failure and as a result Ibrahim was killed. The administrators of his estate ('the plaintiffs') won judgment for damages in negligence against the two defendants, but the learned trial judge held that the insurers of the lorry, the New India Assurance Company Ltd who had been made a third party, were not liable to indemnify the defendants, who would therefore have to pay damages out of their own pocket.

[18] In delivering the grounds of judgment of the Federal Court Suffian CJ stated: A

Then 'Exception to Section II' mention eight exceptions to the above undertaking by the insurers, two of which are material. The material parts are exceptions (ii) and (iii) which read: B

> The company shall not be liable in respect of —
>
> (ii) death of ... any person in the employment of the insured arising out of and in the course of such employment;
>
> (iii) death of ... any person (other than a passenger carried *by reason of or in pursuance of a contract of employment*) being carried in or upon... the motor vehicle at the time of the occurrence of the event out of which any claim arises. C

D

We are concerned mainly with the words italicised.

On the authority of *Izzard v Universal Insurance Company, Limited* [1937] AC 773, a House of Lords decision, which we respectfully follow, it is clear that the above provisions of the policy mean this, that: E

(1) the insurers will indemnify the second defendant and his servant against third party risks, but this is subject to the limits of liability stated in the policy;

(2) in accordance with the limits of liability stated in the policy: F

(a) the insurers will not be liable to indemnify the defendants in respect of third party claims from persons in the employment of the second defendant whose death arose out of and in the course of that employment; and

(b) the insurers will not be liable in respect of death of any person being carried in the lorry at the time of the accident; G

(3) but — and this is an important qualification — the insurers will be liable to indemnify the defendants in respect of the death of any passenger carried on the lorry by reason of or in pursuance of a contract of employment. This is clear from the words italicised in exception (iii) to section II. H

In this case, the contract of employment cannot mean contract of employment with the second defendant, because exception (ii) clearly excludes the insurers from liability in respect of death of any person in the employment of the second defendant arising out of and in the course of such employment. So it is clear that the words in italics can only mean that the insurers will be liable to indemnify the defendants in respect of the death of a passenger not employed by the second defendant and carried by reason of or in pursuance of a contract of employment. I

...

> On the authority of *Baker v Provident Accident and White Cross Insurance Co Ltd* [1939] 2 All ER 690, a decision of Cassels J, we hold that a person is carried 'by reason of' a contract of employment if, for instance, he is directed by his employer to travel in a vehicle, and the employer is able to give that direction because of the relationship of employer and employee; and that a person is carried 'in pursuance of' a contract of employment if it is a term of the contract that he shall be carried.

And further it was explained:

> There was no evidence that it was a term of the contract of employment between the deceased and the Forestry Department that he shall be carried in the second defendant's lorry, so it cannot be said that at the time of the accident he was being carried on the lorry 'in pursuance of' a contract of employment between him and his employers, the Forestry Department.

[19] Emphasis it to be given to the aspect that there has to be a contract of employment and by reason of or in pursuance of the contract, the passenger is carried. For this purpose, the case of *Izzard v Universal Insurance Company, Limited* [1937] AC 773 has been cited by both learned counsel for the appellant and respondent. The case merits mention in the context that it has also been the subject of judicial consideration in the *Union Insurance (M)*, where *Izzard*'s case as well as *Vandyke*'s case, were also ventilated. *Union Insurance (M) Sdn Bhd* case, being a decision of the Court of Appeal, has considered facts that are not only similar, but reference was also made of the application of the contra proferentum rule. The facts require detailing since it would become relevant to the circumstances of the facts before us in that, the Court of Appeal in that case had then affirmed the decision of the sessions court judge and the High Court judge upon appeal. The Court of Appeal in the *Union Insurance (M) Sdn Bhd* case had made references to the very same authorities relied upon by the appellant in this appeal. The facts as considered in summary form are:

> The respondent, while she was travelling to work in her husband's car driven by the son, was involved in a motor accident and suffered injuries. A judgment was entered for her in a suit ('the first suit') which she brought against her son as the first defendant and her husband was roped in as the second defendant since he was the insured in the relevant policy covering the motorcar. The first issue raised was whether the respondent could claim damages from the insurance company ('the appellant') in a suit ('the second suit') for the road accident after judgment had been entered against her husband and son in the first suit. Counsel for the appellant contended that under the policy, the wife fell under one of the two categories of persons to whom the appellant under the policy would not have to indemnify for the negligence of the authorised driver of the insured; the said categories being situations where: (i) the third party was injured in the course of the employment by the insured; or (ii) the third party was a member of the insured's household except if that third party was being carried by reason of or in pursuance of a contract of employment.

[20] The judgment of Abdul Malek Ahmad JCA (as he then was) that are relevant pertains to:

(a) the contra proferentum rule; and

(b) the excerpts from *Izzard*'s case.

In respect of the contra proferentum rule, His Lordship said:

> The learned sessions court judge found from the undisputed facts that the first exemption did not apply to the wife as she was not employed by the insured. She was more inclined to agree with learned counsel for the wife that the second exemption was applicable by virtue of the contra proferentum rule, with regard to the term 'member of the insured's household', citing *Cornish v The Accident Insurance Company, Limited* (1889) 23 QBD 453 where the court said:
>
> > The real difficulty is to express the necessary qualification with which the words must be taken. In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty.
>
> She consequently found that the words 'by reason of or in pursuance of a contract of employment' in the second exemption did not mean that the wife must be employed by the insured.

[21] *Tan Keng Hong*'s case, went on appeal then, to the Privy Council. On this aspect Abdul Malek Ahmad JCA stated:

> It was held by the Privy Council that the words 'by reason of his contract of employment' must be read in conjunction with the words 'in pursuance of' and properly construed, mean 'because the contract of employment expressly or impliedly requires the employee or gives him the right to travel in the motor vehicle concerned'. It does not mean that the passenger was being carried because the driver of the vehicle thought that by reason of the passenger's employment he might *gain some business advantage by doing the passenger the favour of giving him a lift*. They also ruled that there was no term of the forester's contract of employment, express or implied, which required or entitled him to travel on the second appellant's lorry and therefore the insurers were rightly held not to be liable under the policy.
>
> It must be emphasised by us at this point that we find *Tan Keng Hong*'s case is quite distinguishable from the other authorities cited on the facts as the passenger involved was on the vehicle not by reason of or in pursuance of a contract of employment as he was off duty and was merely taking a free ride although the vehicle concerned was involved in a trade related to the passenger's occupation and the authorised driver had given him the ride thinking that he, the authorised driver, might gain some business advantage.

[22] In the *Union Insurance* case the judgment of Abdul Malek JCA also gave approbation to the interpretation of the word 'or' adopted by the High Court judge in the following terms:

> With the word 'or' in the words 'by reason of or in pursuance of a contract of employment' means, to the learned High Court judge, that it should be read disjunctively. To read it conjunctively, he emphasised, would be doing violence to the word 'or'. He concluded that in reading disjunctively, the wife could obtain satisfaction as regards the judgment in the first suit against the insurance company by reason of her contract of employment with Tharmarajoo.

To fortify his reasoning, he stated at p 37 of his judgment as follows:

> The *Pocket Oxford Dictionary* defines the word 'or' as 'introducing alternatives'. The *Britannica World Language Dictionary* defines 'or' as 'the alternative expressed by or is emphasised by prefixing to the first member, or adding after the last'. Put in another way, when there are several possibilities 'or' is placed before the last one. This means that when the word 'or' is used there is a choice to be made, between one or the other and not to accept both of them. Thus, the word 'or' appearing in the bracketed words of cl 9 endorsement D reflects the intention of the insurance company to construe the word 'or' as disjunctive and not conjunctive.

To conclude, he had this to say:

> By virtue of the terms of the policy, I hold and it is my judgment that the wife can enforce that policy against either the policy holder (the husband) or the authorised driver (the son) and the paymaster, at the end of the day, would be the insurance company. An unreasonably strict construction should not be adopted in construing the policy as it will result in manifest injustice to the husband. Insurance companies should not offer, with impunity, seemingly wide coverages to their customers but only to deny liability on tenuous grounds when a claim is actually made. This should not be the case and this court will not countenance it. I would, for the reasons adumbrated above, answer the first issue in favour of the wife.

[23] The circumstances in *Vandyke*'s case are again different for that was a case where on the facts the employers of V and F made arrangements with them under which the employers would provide a car and pay for the petrol. F would pick up V and other employees, and F would drive one way and V the other. While F was driving along a public road and V was a passenger in a car, which unknown to them, did not belong to the employers, V was seriously injured through the negligent driving of F. V was not obliged to travel to work in the car. V brought an action for damages for negligence against F and the employers, with the employers joined as third party as their insurers under an employer's liability policy taken out in 1965. There were other issues in that case but one of the issues again raised for consideration the provision of the Road Traffic Act 1960 s 203, the provisions of which again states:

Road Traffic Act, 1960, s 203: (4) The policy shall not ... be required to cover — A

(a) liability in respect of the death of, or bodily injury to, persons being carried in or upon, or entering or getting on to or alighting from, the vehicle at the time of the occurrence of the event out of which the claims arise; or

(b) liability in respect of the death, arising out of and in the course of his employment, of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment B

(c) ...

Provided that paragraph (a) of this subsection shall not have effect in the case of a vehicle in which passengers are carried for hire or reward or *by reason of or in pursuance of a contract of employment*. C

[24] There were two issues mentioned in the judgment of Lord Denning MR and as stated by His Lordship: D

(v) The upshot of it all is this: If the injury to Mr Vandyke arose 'out of and in the course of his employment' by the Reddington company, it was covered by the employers' liability policy with the Sun Insurance Office. If it did not arise 'out of and in the course of his employment' it ought to have been covered by the road traffic policies. E

With regard to the claims against the insurers for the Road Traffic Act, Lord Denning observed: F

... *A private car is not usually compelled to be insured against liability to passengers. But it is so compelled if it is a vehicle in which passengers are carried 'by reason of or in pursuance of a contract of employment*': see the proviso to s 203(4) of the Road Traffic Act 1960. *Those words are much wider than the words 'in the course of his employment'*. I think that passengers are carried in a vehicle 'by reason of' a *contract of employment whenever such a contract is the cause, or one of the causes, of their being carried*. If they are carried in it habitually or as a matter of practice, the vehicle must be covered in respect of them: see *Connell v Motor Insurers' Bureau* [1969] 2 QB 494. This car undoubtedly falls within this description. It was regularly used to carry these men to and from their work. There should, therefore, have been an insurance policy in existence covering the owner and the driver against liability to passengers. G H

[25] Lord Sachs LJ in the same case observed:

As to the third point, it is, of course, obvious that the relevant phrase is not co-terminous with 'arising out of and in the course of his employment' as used earlier in s 203(4). 'By reason of his employment' embraces a wider category of employees. The essence of the test formulated in the speech of Lord Wright in *Izzard v Universal Insurance Company, Limited* [1937] AC 773, was whether the passenger was being carried on the insured vehicle 'for sufficient practical or business reasons'. I

A In that case an employee had (see p 778) arranged with his employers that he should be able after he had finished his work for the week to go home after working hours, if he so wished, in some vehicle which they would provide. An accident occurred when he was under that arrangement thus going *home in a van owned and insured by a third party*. It was held that he was being carried by reason of his employment though the van did not belong to his employer.

B

[26] Much emphasis has been placed by learned counsel for the appellant on the speech of Lord Wright in *Izzard*'s case. *Izzard*'s case serve to give emphasis that the 'contract of employment' of the passenger carried at the time of the C accident is not confined to the contract of employment between the insured and the passenger only for the insurer to be liable. The contract of employment of the passenger could also be with a third party. Certain passages in *Izzard*'s case were cited by Abdul Malek JCA in the *Union Insurance* case. The relevant parts that merit attention could be stated as follows:

D

It may be appropriate to recapitulate on the facts of *Izzard*'s case at this point (at pp 775–776):

> By a verbal contract made in April 1934, between the builders and one Izzard, a carpenter, who lived at Didcot, it was provided that he should work for them at E Coventry on the terms that he should get a certain rate of pay and that a lorry should be at his disposal for going home at week-ends.
>
> On 21 July 1934, Izzard was being carried home on the insured's vehicle by the insured's servant when it overturned, with the consequence that Izzard sustained such injuries that he died on the following day. In respect of this Izzard's widow — F the present appellant — brought an action against the insured under Lord Campbell's Act and recovered judgment for 850*l*, but as the insured was thereafter adjudicated bankrupt his rights against the company were transferred to and vested in the appellant by virtue of the Third Parties (Rights Against Insurers) Act 1930, and thereupon she claimed the amount from the company.
>
> By an agreement between the company and the appellant her rights under the G policy were referred to an arbitrator, who found in favour of the appellant and his decision was affirmed by MacKinnon J, but that judgment was reversed by the Court of Appeal (Greer LJ dissenting), Siesser and Scott LJJ taking the view that the expression 'contract of employment' in cl (c) above set out was limited to a H contract of employment between a passenger, whose death or injury was caused by the use of the vehicle, and the insured, and that inasmuch as the policy purported to eliminate passenger risk, the company was not liable to indemnify the insured against liability for the death of a passenger carried in the vehicle by reason of or in pursuance of a contract of employment with some person other than the insured.
>
> I The widow appealed to this House.
>
> ...

The essence of the judgment is captured by the following excerpt at pp 782–783:

> I cannot accept the respondent's contention that 'contract of employment' should be construed in the Act as subject to the implied limitation 'with the person insured by the policy'. Such a departure from the clear language used cannot, I think, be justified. I think the Act is dealing with persons who are on the insured vehicle for sufficient practical or business reasons, and has taken a contract of employment in pursuance of which they are on the vehicle as the adequate criterion of such reasons. But there is no sufficient ground for holding that this criterion should be limited to employees of the insured person. Such employees, if injured or killed, would ordinarily fall under exception (I), though I am not prepared to say that there might not be in certain events an employee of the assured who could claim as a passenger. But such cases must be rare. The most probable case is where the man killed or injured was on the vehicle in pursuance of a contract not with the owner of the vehicle but with some one else, for instance, with the person whose goods were being carried on the vehicle: thus a commercial vehicle carrying a contractor's or merchant's goods would frequently and perhaps even normally have on it an employee of the goods owner to see to loading or unloading or delivering the goods or caring for them in transit. For these purposes such a man may be carried as a passenger.
>
> ...
>
> I see every practical reason for construing the phrase in the Act 'contract of employment' as including a contract with a third party. This does not exclude a contract with the insured person. The words used are apt to include both cases. As a matter of words I think the plain meaning is the true meaning. The words of the statute are general and unlimited. To insert the words 'with the insured person' would be to insert words of specific limitation beyond what can be inferred from the general tenor of the Act or policy. If these words had been intended they could and should have been expressed, as was done in the previous para (I). They are not expressed and in my opinion ought not to be and cannot properly be implied.

[27] Learned counsel for the appellant has submitted that the words 'business or practical reasons' should similarly be applicable to the facts of the appeal before us. While giving much focus to the fact that there are persons who may be carried in the vehicle for business or practical reasons, Lord Wright's speech should not be taken out of context. Lord Wright clearly stated:

> I think the Act is dealing with persons who are in the insured vehicle for sufficient practical or business reasons, *and has taken a contract of employment in pursuance of which they are on the vehicle as the adequate criterion of such reasons*.

[28] An appraisal of the precedents cited above and relied upon by the appellant establish that the words 'by reason of or in pursuance of' were really being examined in the context of there being 'a contract of employment'. It is manifest that in the context of this appeal, the term 'contract of employment' is important. It is only after a 'contract of employment' is established that the question then ensues whether the appellant was being carried by reasons of or in pursuance of a contract of employment.

[29] The first question posed in the appeal before this court therefore relates to the status of persons who are to be encompassed within the term 'contract of employment'. Some statutory definitions may be mentioned while keeping in mind the context in which the words appear in the legislation concerned. The following statutory definition may be extracted from various legislation:

(a) Employment Act 1955 (Act 265)
Section 2 — Interpretation

'contract of service' means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to *employ another as an employee* and that other agrees to serve his employer as an employee and includes an apprenticeship contract.

'employee' means any person or class of persons —

(a) included in any category in the First Schedule to the extent specified therein; or

(b) ...

'employer' means any person who has entered into a contract of service to employ any other person as an employee and includes the agent, manager or factor of such first mentioned person, and the word 'employ', with its grammatical variations and cognate expressions, shall be construed accordingly.

First SCHEDULE

[Subsection 2(1)]

Employee

1 Any person, irrespective of his occupation, *who has entered into a contract of service with an employer* under which such person's wages do not exceed one thousand five hundred ringgit a month.

(b) Workmen's Compensation Act 1952 (Act 273)
Section 2(1) — Meaning of 'workman'

(2(1)) In this Act, unless the context otherwise requires, the expression 'workman', subject to the proviso to this subsection, means any person who has, either before or after the commencement of this Act, entered into or works *under a contract of service* or of apprenticeship with an employer, whether by way of manual labour or otherwise, whether the contract is expressed or implied or is oral or in writing, whether the remuneration is calculated by time or by work done and whether by the day, week, month or any longer period:

Provided that the following persons are excepted from the definition of 'workman' —

(a) ...

(b) a person whose employment is of casual nature and who is employed

otherwise than for the purposes of the employer's trade or business, not being a person employed for the purposes of any game or recreation and engaged or paid through a club.

(c) Industrial Relations Act 1967 (Act 177)
Section 2 — Interpretation

'contract of employment' means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman.

'employer' means any person or body of persons, whether corporate or unincorporated, who *employs a workman under a contract of employment*, and includes the Government and any statutory authority, unless otherwise expressly stated in this Act.

'workman' means *any person*, including an apprentice, *employed by an employer under a contract of employment* to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

(d) Employees' Social Security Act 1969 (Act 4)
Section 2(5) — Definitions

'Employee' means any person who is employed for wages under a *contract of service* or apprenticeship with an employer whether the contract is expressed or implied or is oral or in writing, or in conjunction with the work of an industry ...

(i) ...

(ii) ...

(iii) ...

but *does not include* a person of the descriptions specified in the First Schedule.

The First Schedule includes, inter alia, item 2 that stipulates:

(2) Any person whose employment is of casual nature and who is employed otherwise than for purposes of the employer's industry.

(e) Employees Provident Fund Act 1991 (Act 452)
Section 2 — Interpretation

'Employee' means any person, not being a person of the descriptions specified in the First Schedule, who is employed under a *contract of service* or apprenticeship whether written or oral and whether expressed or implied, to work for an employer.

(f) Occupational Safety and Health Act 1994 (Act 574)
Section 3 — Interpretation

'Contract of service' means any agreement, whether oral or in writing whether express or implied, *whereby one person to employ another as an employee* and that other agrees to serve his employer as an employee and includes an apprenticeship contract.

[30] The legislation (a) and (b) mentioned above do not include any further definition of the term 'contract of service' but decisively indicate a relationship between employer and employee. The term 'contract of employment' is defined in the Industrial Relations Act 1967 in s 2, inter alia, as follows:

2 Interpretation

'contract of employment' means any agreement whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a *workman* and that other agrees to serve his employer as a workman.

The term 'workman' is further defined:

'workman' means any person, including an apprentice, employed by an employer under a contract of employment to work for here or reward ...

[31] It is apparent that in Malaysia, the term 'contract of employment' is used interchangeably with 'contract of service' as noted above in the Employment Act 1955 and the Industrial Relations Act 1967 respectively. However despite the difference in the way in which legislation has defined the term 'contract of service' or 'contract of employment' the essential characteristic of these definitions is that the contract must be between an employer and an employee with regard to the provision of service by the employee. It is also to be noted that by statutory definition the term 'workman' is used interchangeably with the term 'employee'.

[32] In Malaysia, the Federal Court per Chang Min Tat FJ in *Assunta Hospital v Dr A Dutt* [1981] 1 MLJ 115:

The question whether Dr Dutt was a workman within the definition in the Act so as to avail himself of the provisions thereof, in our view is a mixed question of fact and law and clearly within the province of the chairman to find in a reference to him of the workman's representations of dismissal without just cause or excuse.

[33] The term 'workman' has been subject to judicial appreciation by the Federal Court in the decision of *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304. The question that arose, inter alia, was whether the Industrial Court was correct in arriving at a conclusion whether the appellant was a workman under s 20(1) of the Industrial Relations Act 1967. In his judgment, Chang Min Tat FJ said:

As for the determination whether Dr Dutt was or was not a workman within the Act, we have, in an earlier decision *Assunta Hospital v Dr A Dutt* [1981] 1 MLJ 115, said that the question is a mixed questions of fact and law and it is for the Industrial Court to determine this question. The fact is that the ascertainment of the relevant conduct of the parties under their contract and the inference proper to be drawn therefrom as to the terms of the contract and the question of law, once the terms have been ascertained, is the classification of the contract for services or for service: see also *Australian Timber Workers Union v Monaro Sawmills Pty Ltd* (1980) 29 ALR 322.

[34] As already noted above, 'workman' is a person employed under a contract of employment. This term has been usefully explained in *Chitty on Contracts*, Vol II — Specific Contracts, (30th Ed):

Contracts of employment were known to the law for many years as master and servant contracts, but this terminology now has archaic connotations, and is not found in modern legislation. There is no comprehensive definition of such a contract and the decided cases merely indicate a number of indicia or factors which are relevant to a finding that a particular contract is one of employment, or a 'contract of service'. The presence or absence of any one such factor is not conclusive, since the decision depends on the combined effect of all the relevant factors, when those pointing towards 'employment' are weighed up with those pointing against. A contract of employment or of service is generally contrasted with a contract in which an independent contractor is engaged to perform a particular task, often known as a 'contract of services'.

And further it is also discussed:

The case law suggests that the factors relevant to the process of identifying a contract of employment may usefully be listed as follows:

(1) the degree of control exercised by the employer;

(2) whether the worker's interest in the relationship involved any prospect of profit or risk of loss;

(3) whether the worker was properly regarded as part of the employer's organisation;

(4) whether the worker was carrying on business on his own account or carrying on the business of the employer;

(5) the provision of equipment;

(6) the incidence of tax and national insurance;

(7) the parties' own view of their relationship;

(8) the structure of the trade or profession concerned and the arrangements within it.

[35] The Federal Court in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369, has made a comparison between a

contract of service and an 'independent contractor who is engaged under a contract for services', with the latter not be categorised as a workman. The relevant remarks are found in the judgment (per Gopal Sri Ram JCA at p 391):

> In our judgment, the correct test to be applied in determining whether a claimant is a workman under the Act is that enunciated by Chang Min Tat FJ in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 at p 311. We accordingly hold that a workman under the Act is one who is engaged under a contract of service. An independent contractor who is engaged under a contract for services is not a workman under the Act. We take this view because it provides, as earlier observed, for a flexible approach to the determination of the question. It is fairly plain to see why flexibility is achieved by having resort to this test.
>
> In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an employer exercises over a claimant is an important factor, although it may not be the sole criterion. The terms of the contract between the parties must, therefore, first be ascertained. Where this is in writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions. Where it is not then its terms must be established and construed. But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. These include, but are not confined, to the conduct of the parties at all relevant times. Their determination is a question of fact. When all the features of the engagement have been identified, it becomes necessary to determine whether the contract falls into one category or the other, that is to say, whether it is a contract of service or a contract for services.
>
> There is not a single satisfactory test that is available for the determination of the issue. However, most academics are agreed that the well-known pronouncements of Lord Thankerton in *Short v J & W Henderson Ltd* (1946) 62 TLR 427, of Denning LJ in *Stevenson, Jordan & Harrison, Ltd v Macdonald & Evans* [1952] 1 TLR 101, and of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497; [1968] 2 WLR 775 come fairly close to the point.

[36] *Stevenson, Jordan & Harrison, Ltd v Macdonald & Evans* [1952] 1 TLR 101 cited in *Hoh Kiang Ngan*'s case contain useful observations of the distinction between a contract of service and that of a contract for services (per Lord Denning):

> ... As my Lord has said, it is almost impossible to give a precise definition of the distinction. It is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi man, and a newspaper contributor are all employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

> It must be remembered, however, that a man who is employed under a contract for service may sometimes perform services outside the contract. A good illustration is *Byrne v Statist Co* [1914] 1 KB 622, where a man on the regular staff of the newspaper made a translation for the newspaper in his spare time. It was held that the translation was not made under a contract of service but under a contract for services. Other instances occur, as when a doctor on the staff of a hospital or a master on the staff of a school is employed under a contract of service to give lectures or lessons orally to students. If, for his own convenience, he puts the lectures into writing, then his written work is not done under the contract of service. It is most useful as an accessory to his contracted work, but it is not really part of it. The copyright is in him and not in his employers.

[37] It is untenable to suggest or even to infer that the words 'contract of employment' as contained in s 91(1)(bb) of the RTA should import a definition that should differ or depart from the definitions already stipulated in the various legislation stated above as they are legislation intended to regulate the relationship between a workman (or employee) with an employer.

[38] In this appeal before us, the High Court has made a finding of fact that the appellant is an independent contractor. The Court of Appeal in affirming the decision of the High Court has made an extensive evaluation of the law pertaining to the question of contract of services as opposed to contract for services. This brings forth the simple question whether there is any cogent reason for this court to state that the findings on law or fact have been erroneous such that there is ground to warrant intervention on the justice of the case.

[39] The facts in this appeal by their very nature indicated that the appellant was engaged for a specific propose. Nothing here was admitted that she would be directed by Angel as to how the beautifying process of the bride could take place. The appellant herself denied being an employee. This reduces the appeal to a single matter. We are not here concerned with nomenclature but to ascertain what is the true nature of the relationship of the parties. The appellant cannot by labeling or formulating some words change the true nature of the relationship. There is not here a construction of a written contract but an appraisal of the whole nature of the relationship.

[40] In the circumstances of this case reliance would also be made on yet another observation with regard to appellate intervention in *O'Kelly and others v Trusthouse Forte plc* [1984] QB 90, per Sir John Donaldson MR:

> The judgment of the appeal tribunal in this case suggests that there is a difference of judicial view as to whether the question 'Is a contract a contract of employment or a contract for services?' is a mixed question of fact and law or a question of law, but I

do rather doubt whether the triple categorisation of issues as 'fact', 'law' and 'mixed fact and law' is very helpful in the context of the jurisdiction of the appeal tribunal.

The appeal tribunal is a court with a statutory jurisdiction. So far as is material, that jurisdiction is limited to hearing appeals on questions of law arising from any decision of, or arising in any proceedings before, an industrial tribunal: s 136 (1) of the Employment Protection (Consolidation) Act 1978. If it is to vary or reverse a decision of an industrial tribunal it has to be satisfied that the tribunal has erred on a question of law.

Whilst it may be convenient for some purposes to refer to questions of 'pure' law as contrasted with 'mixed' questions of fact and law, the fact is that the appeal tribunal has no jurisdiction to consider any question of mixed fact and law until it has purified or distilled the mixture and extracted a question of pure law.

The purification methods are well known. In the last analysis all courts have to direct themselves as to the law and then apply those directions in finding the facts (in relation to admissibility and relevance) and to the facts as so found. When reviewing such a decision, the only problem is to divine the direction on law which the lower court gave to itself. Sometimes it will have been expressed in its reasons, but more often it has to be inferred. This is the point of temptation for the appellate court. It may well have a shrewd suspicion, or gut reaction, that it would have reached a different decision, but it must never forget that this may be because it thinks that it would have found or weighed the facts differently. Unpalatable though it may be on occasion, it must loyally accept the conclusions of fact with which it is presented and, accepting those conclusions, it must be satisfied that there must have been a misdirection on a question of law before it can intervene. Unless the direction on law has been expressed it can only be so satisfied if, in its opinion, no reasonable tribunal, properly directing itself on the relevant questions of law, could have reached the conclusion under appeal. This is a heavy burden on an appellant. I would have thought that all this was trite law, but if it is not, it is set out with the greatest possible clarity in *Edwards (Inspector of Taxes) v Bairstow and another* [1956] AC 14.

There is no doubt that there are pure questions of law which throw a court back to questions of fact. The most obvious example is what length of notice is required to terminate a contract which does not expressly make provision for termination. This is a pure question of law and the answer is 'Such time as is reasonable in all the circumstances'. Applying that direction to facts whose nature, quality and degree are known with complete precision will no doubt always produce the same answer. But this is not real life. In reality every tribunal of fact will find and assess the factual circumstances in ways which differ to a greater or lesser extent and so can give rise to different conclusions, each of which is unassailable on appeal. In this sense, but in this sense alone, their conclusions are conclusions of fact. More accurately they are conclusions of law which are wholly dependent upon conclusions of fact.

The test to be applied in identifying whether a contract is one of employment or for services is a pure question of law and so is its application to the facts. But it is for the tribunal of fact not only to find those facts but to assess them qualitatively and within limits, which are indefinable in the abstract, those findings and that assessment will dictate the correct legal answer. In the familiar phrase 'it is all a question of fact and degree'.

> It is only if the weight given to a particular factor shows a self misdirection in law that an appellate court with a limited jurisdiction can interfere. It is difficult to demonstrate such a misdirection and, to the extent that it is not done, the issue is one of fact. This, I think, is what this court meant in *Simmons v Heath Laundry Company* [1910] 1 KB 543 which, so construed, is consistent with *Edwards (Inspector of Taxes) v Bairstow and another* [1956] AC 14.

[41] After having considered the issue as above, it is found that the first question posed to this court is an attempt to sidetrack the facts in this appeal. A 'contract of employment' is equipollent to a 'contract of service'. The legislation has to be construed according to its terms and it is not permissible to deviate from its very terms. No question here arises of having to consider the word 'employment' or what activity could be described as being a certain variety of employment. The variety of employment, if any, is simply one facet of a contract of employment. The legislation has been crafted in specific terms. Hence the second part of the first question is therefore found to be totally unnecessary to answer.

[42] The second question is also calculated to mislead for it is tantamount to requesting the court to rewrite the legislation. One could use the term a 'contract of employment' or under a *contract of service*. Both connote the same thing. The question is tautological and indeed calculated to assert an ambiguity when there is none.

[43] Both questions in effect invite this court to import words that are not there and to freely interpret the law to accord to a certain view favorable to the appellant. It justifies the reminder made in *Ulster-Swift Ltd and another v Taunton Meat Haulage Ltd; Franson Transport NV (third party)* [1977] 1 WLR 625 where Megaw LJ said:

> [The danger of such latitude] is not, indeed, that the judges become legislators, but that they may become legislators with widely differing, and perhaps unduly legalistic, views of the policy which is, or ought to be, behind the legislation. Hence the law, whatever it may gain in other respects, may in some cases suffer a loss in what has always been regarded as one of the essential features of law — uniformity; or at least predictability. Sometimes, in relation to the judicial view of 'the presumed purpose of the legislation', it may be a case of *quot judices, tot sententiae*: whereas in relation to what the legislation has actually said, it is unlikely that judicial opinion would vary so widely.

[44] This is also an instance where the dissenting judgment in the Court of Appeal below has wrongly invoked and relied upon s 96(1) of the RTA 1987 to find that the respondents in this appeal is liable. Section 96(1) of the RTA 1987 no doubt provides:

Duty of insurers to satisfy judgements against persons insured in respect of third party risks

96

(1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

[45] Nevertheless what should not be overlooked are the words in parenthesis. It must be a liability covered by the terms of the policy. By suggesting that the terms of the policy are to be broadly interpreted also overlook that there is a question of premiums. As aptly expressed by Sachs LJ in *Vandyke*'s case:

... the average man appreciates the distinction between being on the way to work and being at work — and it is not for the common law to produce confusion. Similarly it would be a disservice to the insurance world unnecessarily to blur the line between road traffic risks and employment risks. Moreover, anyone disposed to look with a seeing eye at the relatively small premium paid in the present case for the employers' liability policy may reasonably wonder whether such a disservice would not in the end also react to the detriment of the price paying community.

[46] Finally, it would be necessary to allude to the state of legislation in the United Kingdom where the situation has changed. The explanation is provided in *MacGillivary on Insurance Law* (11th Ed) (at para 29-012) as follows:

Before 1972 it was not compulsory to insure in respect of liability for death or bodily injury sustained by passengers carried in the insured vehicle unless they were carried for hire or reward or by reason or in pursuance of a contract of employment. There were therefore decisions on the meaning of the phrase 'by reason of or in pursuance of a contract of employment'. Since this phrase does not appear in the current legislation and will not appear in current motor policies as opposed to employers' liability policies, little purpose would be served by examining the relevant decisions in this chapter. Under the present legislation, and as required by EC law, policies must cover passengers on the same footing as any other injured third parties.

Under the former law, the advice often offered to drivers whose policies did not cover liability to passengers was to obtain from the passengers an agreement that they were carried 'at their own risk' or something to the same effect.

[47] The explanation above serves to reinforce the fact that the state of current legislation here in Malaysia is different from that in the United Kingdom. If it is to be changed it is in the domain of the Legislature.

[48] In the final analysis, this appeal is therefore dismissed with costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon